No. 89-1444

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

SHRINERS HOSPITALS FOR CRIPPLED CHILDREN,
Petitioner,

v.

FIRST SECURITY BANK OF UTAH, N.A., *et al.*,
Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Wyoming

BRIEF FOR AMERICAN NATIONAL RED CROSS, UNITED WAY OF AMERICA, SALVATION ARMY, NATIONAL AUDUBON SOCIETY, ASSOCIATION OF CATHOLIC COLLEGES AND UNIVERSITIES, BAPTIST JOINT COMMITTEE ON PUBLIC AFFAIRS, CHRISTIAN COLLEGE COALITION, EVANGELICAL COUNCIL FOR FINANCIAL ACCOUNTABILITY, GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS, NATIONAL ASSOCIATION OF HOMES FOR CHILDREN, UNITED CHURCH OF CHRIST, AND INDEPENDENT SECTOR AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the Due Process Clause of the Fourteenth Amendment guarantees a trust beneficiary notice of a judicial proceeding held to approve an estate's sale of property left to a trust in which the beneficiary has a vested remainder interest.

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INTEREST OF AMICI CURIAE

Amici curiae are publicly-supported charitable organizations whose objectives include relief of disaster victims,

the conduct of blood services programs, and biomedical research; conservation of wildlife and natural resources; care and service to children and families in crisis; relief of the poor; advancement of education; and promotion of mental, spiritual, and religious health.[1] *Amicus curiae* Independent Sector was formed in 1980 to preserve and enhance this Nation's tradition of giving, volunteering, and not-for-profit initiative. Among its 700 members are many of the major philanthropic and national voluntary organizations in the country.[2] All *amici* are exempt from federal income tax under section 501(c)(3) of the Internal Revenue Code[3] and are qualified to receive tax-deductible charitable contributions under sections 170(c)(2) (income tax), 2055 (estate tax), and 2522 (gift tax).

Amici seek to promote charitable giving, including bequests. Charitable remainder trusts and similar instruments are an extremely important element in charitable giving, especially in the estate-tax context. In *amici's* experience, charities that are the vested beneficiaries of such trusts frequently have difficulty in learning of their entitlements. Absent notice of pending judicial proceedings affecting the trusts, charities are often denied the opportunity to be heard concerning transactions that vitally affect their interests.

Counsel for all parties have consented to the filing of this brief. Letters of consent are on file with the Clerk.

STATEMENT

1. Charitable remainder trusts ("CRTs"), often called "split-interest trusts," are an extremely common method

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[1] A more detailed description of each *amicus* appears in the Appendix.

[2] Independent Sector acts in this matter through its board of directors; its filing this brief does not imply that each of its member organizations has taken a position on the question presented here.

[3] Unless otherwise indicated, all statutory references are to the Internal Revenue Code of 1986 (26 U.S.C.), as amended ("the Code" or "IRC").

of making charitable gifts. Such trusts may be either testamentary or *inter vivos*. Under the typical pattern, a donor transfers property to an irrevocable trust, granting an income interest to family members (or retaining it herself) for life or a specified term of years. At the death of the life tenant or the expiration of the term, all property in the trust passes to one or more charitable remaindermen.

CRTs are usually structured to enable the donor (either the individual or her estate) to secure a current tax deduction for the value of the property that will ultimately pass to charity. To secure such tax benefits, a CRT must be drafted in strict compliance with Internal Revenue Code requirements. *See* IRC §§ 664, 2055(e)(2)(A). These provisions are designed to ensure that the value of property that actually passes to charity corresponds to the tax deduction claimed when the trust was established. *See* S. Rep. No. 552, 91st Cong., 1st Sess. 87 (1969). This means that the charity's remainder interest must be vested, *i.e.*, not subject to defeasance or diminution by the exercise of powers of invasion or contingencies not susceptible of actuarial quantification.[4]

2. Petitioner Shriners Hospitals for Crippled Children is exempt from federal income tax under section 501(c)(3) of the Code. It was one of two named charitable beneficiaries of a qualified CRT created by the will of a Utah decedent. The life interest was held by the decedent's sister, aged 81 when probate commenced. The decedent's federal estate

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[4] If a CRT complies with tax Code requirements (a "qualified CRT"), the donor or her estate is entitled to a charitable contribution deduction in an amount equal to the actuarially-determined present value of the charitable remainder. This sum is computed by reducing the gross amount of the gift by the expected value of the life tenant's interest, calculated by use of unisex actuarial tables set forth in the regulations. Treas. Reg. § 1.664-4(b)(5). The CRT itself is exempt from federal income tax for the life of the trust (except on unrelated business taxable income). IRC § 664(c).

tax return claimed a charitable contribution deduction, in the amount of $875,038, for property transferred to the trust (R. 862).

Respondent First Security Bank of Utah occupied the dual roles of executor under the will and trustee of the CRT.[5] Respondent did not notify petitioner or the other trust beneficiaries of the decedent's death or of the commencement of probate proceedings. Indeed, petitioner was not even aware that the trust existed until after the events complained of here. Pet. App. A2-A3.

The principal asset of the estate was a ranch in Wyoming. Shortly after the will was admitted to probate, respondent sought approval of the Wyoming probate court to sell the ranch to a group of local investors. In its petition, respondent stated that it had given notice of the proposed sale to five specific devisees under the will, and to itself as trustee of the CRT. Neither petitioner nor the other two trust beneficiaries received formal notice of the proposed sale, either from respondent or the probate court (Pet. App. A4). It appears, however, that respondent discussed the sale informally with the life tenant and the other charitable remainderman (R. 499). The probate court granted its approval and the sale was consummated.

Several months later, petitioner learned from sources other than respondent that it was a beneficiary under the will and that the principal asset destined to fund the CRT had been sold with court approval. Petitioner filed this action in Wyoming District Court seeking to vacate the order approving the sale, contending that the probate court's approval, without notice to the vested trust beneficiaries, violated the Wyoming probate code and the

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[5] Respondent's Wyoming affiliate, First Security Bank of Rock Springs, assisted in handling ancillary probate matters involving the estate's Wyoming assets. For the sake of convenience, we will refer to the banks collectively as "respondent."

Due Process Clause of the Fourteenth Amendment (R. 131-136, 142-166, 563-567, 569, 718, 736-737). The trial court denied relief without addressing petitioner's federal constitutional claims (Pet. App. C).

A divided Wyoming Supreme Court affirmed (Pet. App. A & B). Although Wyoming law requires probate courts to notify "all of the beneficiaries named in the will" of proposed sales of an estate's real property, the Court held that this provision does not require notice to charitable remaindermen like petitioner. "The crux of this case," the Court stated, "is that any beneficiary of a trust created in a will is not a beneficiary under the will for purposes of [Wyoming's] notice requirements" (Pet. App. B3). Although petitioner reiterated its federal constitutional claims in the initial hearing before the Wyoming Supreme Court (*see* Pet. App. A9 (Cardine, C.J., dissenting)) and in its supplemental brief on rehearing (*see id.* at B4 (Rooney, J., dissenting)), the majority of that Court, like the District Court, rejected those contentions *sub silentio*.

Because it was denied notice of the probate proceeding, petitioner had no opportunity to bring several relevant points to the probate court's attention. These include petitioner's allegations: (1) that respondent had a potential conflict of interest, owing to its divergent duties to the estate's creditors and legatees, to the life tenant of the trust, and to the charitable remaindermen; (2) that the proposed sales price was 30% below the figure at which respondent itself had appraised the ranch when commencing probate; (3) that the proposed sales price reflected no compensation for subsurface mineral rights, despite the ranch's proximity to a proven natural gas field; (4) that the estate had sufficient liquid assets to render sale of the ranch unnecessary; and (5) that petitioner, possibly unlike other beneficiaries of the CRT, was willing to accept distribution of the real estate in kind.

REASONS FOR GRANTING THE PETITION

This case is of great importance, not only to the Nation's charities, but also to the Federal Government, both in its regulatory capacity and in its role as a potential beneficiary of charitable trusts. The decision of the Wyoming Supreme Court squarely conflicts with this Court's decisions concerning the requirements of the Fourteenth Amendment's Due Process Clause, and also conflicts, either directly or in fundamental principle, with the holdings of other state supreme courts. Certiorari is clearly warranted under these circumstances and, given the plain conflict with this Court's precedents, the Court may wish to consider summary reversal.

1. The decision of the Wyoming Supreme Court directly conflicts with this Court's decisions in *Mullane v. Central Hanover Bank*, 339 U.S. 306 (1950), *Mennonite Board of Missions v. Adams*, 462 U.S. 791 (1983), and *Tulsa Professional Collection Services v. Pope*, 485 U.S. 478 (1988). Those cases enunciate the now-familiar proposition that:

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.

Mullane, 339 U.S. at 314; *Mennonite Board*, 462 U.S. at 795; *Tulsa Professional*, 485 U.S. at 484. These cases squarely hold that persons with interests in property (including trust beneficiaries, as in *Mullane*) are entitled to notice by mail of judicial proceedings that may adversely affect their interests (including judicial sales and probate proceedings, as in *Mennonite Board* and *Tulsa Professional*, respectively), so long as the identity and whereabouts of such individuals are "known or reasonably ascertainable." *Tulsa Professional*, 485 U.S. at 491; *Men-*

nonite Board, 462 U.S. at 800; *Mullane*, 339 U.S. at 318-320.

All of the factors required to trigger notice under the Due Process Clause, as construed in these decisions, are present here. The Wyoming probate court's approval of respondent's proposal to sell trust property plainly constitutes "state action."[6] As the vested remainderman of a trust, petitioner possessed a property interest that could be "adversely affected" (*Tulsa Professional*, 485 U.S. at 485) or "subject to diminution" (*Mullane*, 339 U.S. at 313) by the proposed sale.[7] Finally, petitioner's identity and whereabouts were obviously "known or reasonably ascertainable" by respondent. Not only is petitioner a nationally recognized hospital; it was a named beneficiary of a trust of which respondent was trustee, created by a will of which respondent was executor.

In rejecting petitioner's due process challenge, the Wyoming Supreme Court evidently concluded that

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[6] *See Tulsa Professional*, 485 U.S. at 486: "[W]hen private parties make use of state procedures with the overt, significant assistance of state officials, state action may be found." Indeed, the existence of state action here follows *a fortiori* from *Tulsa Professional*. The Court there held that the state's "pervasive and substantial" involvement in the overall probate process was enough to constitute "state action," even though the probate court was not asked to approve any particular transaction (*id.* at 487). Here, by contrast, the probate court was asked to approve, and actually did approve, respondent's sale of trust property.

[7] Petitioner's property interests could be affected adversely in two ways. First, sale of the ranch at a price below its fair value would proportionately reduce the value of petitioner's vested remainder. Second, the probate court's approval of the sale could cut off or complicate petitioner's cause of action against respondent for mismanagement of the trust. *See Mullane*, 339 U.S. at 313 (noting that judicial approval of trustee's accounting "may cut off [the beneficiaries'] rights to have the trustee answer for negligent or illegal impairments of their interests"); Wyo. Stat. Ann. § 2-7-620 (apparently barring collateral attacks on judicially-approved probate sales).

respondent's notice to itself, as trustee of the CRT, was constructive notice to the trust beneficiaries sufficient for due process purposes. This Court in *Mullane* rejected precisely that argument. The defendant in that case was a trustee seeking judicial approval for its accounting of trust income and disbursements. The Court acknowledged the general rule that a trustee, as a fiduciary and "caretaker" for the beneficiaries, is generally competent to act for them (339 U.S. at 316). Yet the Court held that the nature of the proceeding required that the beneficiaries be personally notified, since "it is their caretaker who in the accounting becomes their adversary" (*ibid.*).

In *Tulsa Professional*, the Court made the same point in the probate context. It noted that an executor has potentially conflicting duties to legatees and creditors of the estate, and it held that such a conflict underlines the need for actual notice enabling creditors personally to protect their interests.[8] Because respondent in the instant case, given its twin capacities as executor and trustee, had potentially conflicting duties to the estate's beneficiaries, to the trust's life tenant, and to the charitable remaindermen, respondent's notice to itself did not constitute notice to petitioner adequate under the Due Process Clause.

This Court has emphasized that the Fourteenth Amendment requires individualized notice except in those unusual circumstances where the persons to be notified are extremely numerous and difficult to locate. In *Mullane*, the defendant served as common trustee of 113 trusts with thousands of beneficiaries (339 U.S. at 309). While insisting upon notice by mail to "known [beneficiaries] whose where-

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[8] *See* 485 U.S. at 489: "[T]he executor or executrix will often be, as is the case here, a party with a beneficial interest in the estate. This could diminish an executor's or executrix's inclination to call attention to the potential expiration of a creditor's claim. There is thus a substantial practical need for actual notice in this setting."

abouts are also known" (*id.* at 320), the Court ruled that notice by publication sufficed for "contingent beneficiaries," beneficiaries whose interests were "so remote as to be ephemeral," and "beneficiaries whose interests are either conjectural or future or * * * do not in the ordinary course of business come to the knowledge of the common trustee" (*id.* at 317-318). The Court in *Tulsa Professional* similarly stated that "it is reasonable to dispense with actual notice to those with mere 'conjectural' claims" and those whose identities are not "reasonably ascertainable" (485 U.S. at 490, 491).

In this case, it is clear that personal notice by mail to petitioner was constitutionally required. Petitioner had a remainder interest in the trust that was presently vested in right; its claim was neither contingent, ephemeral, conjectural, or remote. Although petitioner's interest was a "future interest" in the sense that its possession of the trust property was temporally deferred, even petitioner's right to possession was not "future" by much, since the sole life tenant was 81 when probate commenced and died soon thereafter.[9]

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[9] This Court in *Mullane* by no means suggested that holders of future interests are disentitled as a class to notice under the Due Process Clause. The Court mentioned future interests, rather, as examples of interests that might be so conjectural, or so difficult for the trustee to ascertain, as to make notice by publication the only feasible course. The Court's actual holding in *Mullane* was that the Due Process Clause prohibits a state from "depriving *known persons whose whereabouts are also known* of substantial property rights," without reference to the present or future character of such beneficiaries' claims (339 U.S. at 320 (emphasis added)). In *Mennonite Board*, the Court stated that "actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of *any* party, * * * if its name and address are reasonably ascertainable" (462 U.S. at 800 (emphasis original)). Indeed, the property interests at stake in *Mennonite Board* (a mortgage-holder's lien) and in *Tulsa Professional* (a contract right of action) were species of future interests, yet the Court held both entitled to due process protection. Any distinction

Most importantly, there were only three beneficiaries of the instant charitable remainder trust, and all three were known to respondent. This was not a case where the "character of the proceedings" entailed "frequent investigations into the status of a great number of beneficiaries" (*Mullane*, 339 U.S. at 317). Nor is there any other reason to suppose that actual notice to the two charitable remaindermen would have been "so cumbersome as to unduly hinder the dispatch with which probate proceedings are conducted" (*Tulsa Professional*, 485 U.S. at 490).

2. The decision of the Wyoming Supreme Court also conflicts, either directly or in fundamental principle, with the decisions of other state supreme courts. In *McKnight v. Boggs*, 253 Ga. 537, 322 S.E.2d 283 (1984), the Georgia Supreme Court held that the Due Process Clause mandates notice of probate proceedings to persons with an inchoate interest in an estate's property—in that case, beneficiaries of another purported will of the same decedent. The court held that "an inchoate interest in real property [is] a legally protected interest" and that "under *Mullane*, * * * it is clear that due process prohibits deprivation of property without notice and an opportunity to be heard." 322 S.E.2d at 283-284.

In *Lilly v. Duke*, 376 S.E.2d 122 (W.Va. 1988), the West Virginia Supreme Court, following this Court's decision in *Mennonite Board*, held that the Fourteenth Amendment mandates notice to beneficiaries of a deed of trust prior to a sheriff's tax sale of the realty. Citing *Mullane*, the court concluded: "Where a party having an interest in the property can reasonably be identified from public records or otherwise, due process requires that such party be provided notice by mail or other means as certain to ensure actual notice." 376 S.E.2d at 125.

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between an income interest in a trust and a vested remainder interest would be wholly untenable for Fourteenth Amendment purposes.

In *Palazzi v. Estate of Gardner*, 32 Ohio St. 3d 169, 512 N.E.2d 971 (1987), the Ohio Supreme Court, in considered dictum, concluded that the Due Process Clause requires actual notice of probate proceedings to nonresident, contingent beneficiaries of an estate. The claimant there was an heir who would take through intestacy if the will were invalidated. Citing *Mullane*, the court reasoned that a claim "to a portion of the assets of [an] estate clearly amounts to an assertion of a property interest under a traditional due-process analysis." "It is immaterial," the court stated, "whether the alleged property interest is characterized as vested or contingent." 512 N.E.2d at 974.

We have discovered no decisions of state supreme courts involving the exact fact pattern here, namely, a fiduciary's failure to notify charitable remaindermen of judicial proceedings affecting their rights. The California appellate courts, however, have held that notice in very similar circumstances is constitutionally required. In *Estate of Reed*, 259 Cal. App. 2d 14, 66 Cal. Rptr. 193 (Ct. App. 2d Dist. 1968), a bank serving as executor and trustee failed to notify charitable residuary beneficiaries of judicial proceedings held to approve transactions in trust property. The court ruled the lack of notice unconstitutional, citing *Mullane* for the proposition that "when the rights of beneficiaries to a trust are inevitably affected, they are entitled to notice and are indispensable parties" (66 Cal. Rptr. at 198). The court specifically held that "notice given to the bank as trustee and executor [was] not binding on the [charitable] beneficiaries," noting the bank's potentially conflicting duties. *Id.* at 199 n.3.[10]

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[10] *Accord*, *Estate of Lacy*, 54 Cal. App. 3d 172, 126 Cal. Rptr. 432 (Ct. App. 2d Dist. 1975) (requiring notice to remaindermen of judicial proceeding held to settle trustee's account). Other state courts have reached similar results without specific reliance on the Federal Constitution. *E.g.*, *Azarian v. First National Bank*, 383 Mass. 492, 423

3. The question presented is of great importance to the Nation's charities. Charitable remainder trusts and other "split-interest" trusts represent a major source of funds for amici and other philanthropic organizations. The National Audubon Society estimates that charitable remainders and other deferred gifts represent about 25% of the total contributions it receives. Many of Independent Sector's members—especially universities, hospitals, social-welfare organizations, and religious groups—derive a substantial part of their endowments from such gifts.

CRTs owe their popularity to their convenience and tax advantages. They enable a donor, in a single instrument, to make a sizable charitable contribution and, at the same time, provide for the support of family members during their lifetimes. Despite retention of such income rights, the donor or his estate is entitled to an immediate tax deduction for the actuarially-determined present value of the charitable remainder. One index of CRTs' popularity is the frequency with which their benefits are emphasized in the estate planning literature.[11]

N.E.2d 749 (1981) (requiring notice to trust beneficiaries of judicial proceeding held to settle trustee's account, citing state trust law); *In re Trusts Created by Hormel*, 282 Minn. 197, 163 N.W.2d 844 (1968) (requiring notice to trust beneficiaries of judicial proceeding held to consider replacement of trustee, citing state constitution).

[11] *See, e.g.*, Colburn, *Securing Tax Benefits from Charitable Remainder and Charitable Lead Trusts*, 16 Estate Plan. 154 (1989); Raabe & Boucher, *Using Charitable Remainder Trusts in the Estate Plan*, 13 Rev. Tax. Indiv. 3 (1989); Popovich, *Charitable Remainder Unitrusts in Estate Planning*, 15 Pepperdine L. Rev. 367 (1988); Teitell, *The Internal Revenue Service Has Issued Model Agreements for One-Life Inter Vivos Charitable Remainder Unitrusts*, 128 Trusts & Estates, May 1989, at 56 ; Wilson & Simmons, *Charitable Lead Trusts & Charitable Remainder Trusts*, 1 Probate & Prop. No. 6, 23 (1987); Hoffman, *Tax Planning with Charitable Trusts*, 16 Colo. Law. 1958 (1987); Darling, *The Charitable Remainder Trust as an Estate Planning Tool*, 44 N.Y.U. Inst. Fed. Tax. 57 (1986); Hicks, *Charitable Remainder Trusts as Retirement Vehicles*, 10 Estates, Gifts & Trusts J. 143 (1985); Wei-

The IRS has advised, in response to a FOIA request, that more than 36,000 CRTs filed federal tax returns on IRS Form 5227 during 1988. Knowledgeable experts in the field estimate that between 3,000 and 4,000 new CRTs are created annually. Although the aggregate value of assets held in such trusts is difficult to determine precisely, it is safe to assume that this figure is well in excess of $5 billion. A recent sampling of 15 bank and trust companies revealed that they serve as trustees for 3,125 CRTs, with aggregate assets in excess of $725 million.[12] In 1986, colleges and universities alone were beneficiaries of CRTs with assets in the range of $1.6 billion;[13] that figure can be expected to have grown to $2.7 billion by now through subsequent gifts and market-value appreciation. The Council for Aid to Education estimates that the amount of deferred gifts (principally CRTs) to some 1,100 private educational institutions during 1987 totalled $425 million—about 11% of all gifts by individuals to such institutions during that year.[14] As charities place increased emphasis on "planned giving," the rapid growth in assets held by CRTs will likely continue.

Despite the importance of CRTs to charities, most states do not require that charitable remaindermen be notified of the commencement of probate proceedings or of trust transactions (such as asset sales) that may vitally affect

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thorn, *Using the Charitable Remainder Trust as a Sophisticated Contribution Technique*, 43 N.Y.U. Inst. Fed. Tax. 17 (1985); Lichter, *Profiles in Philanthropy: Opportunities for Gifts*, 124 Trusts & Estates, Sept. 1985, at 22; Stern, *The Split-Interest Trust as a Charitable Giving Vehicle*, 42 N.Y.U. Inst. Fed. Tax. 28 (1984); Schmolka, *Income Taxation of Charitable Remainder Trusts*, 40 Tax L. Rev. 5 (1984).

[12]Estes, *Managing Charitable Assets*, Fund Raising Management 26-36 (Feb. 1990).

[13] National Center for Education Statistics, *Financial Statistics of Institutions of Higher Education*, Table 5 (1986).

[14] Council for Aid to Education, *Voluntary Support of Education 1977-1988*, at 7 (June 1989).

charities' interests. Only two states have statutes specifically requiring notice to charities in circumstances like those here—California and New York.[15] A few states have no relevant notice provision or provide expressly that notice is not required.[16] But most state laws do not specifically address the question of notice to CRT beneficiaries. Rather, they provide generally that the executor or probate court must furnish notice of probate proceedings to "devisees" or "devisees and legatees,"[17] to beneficiaries "named in the will,"[18] or to "interested persons."[19] As is clear from the Wyoming Supreme Court's decision here, it is anybody's guess whether a state court would construe the latter terms to include charitable remaindermen. Some states require that the attorney general[20] or other gov-

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[15] *See* Cal. Prob. Code § 1208 (1990) (requiring notice to trust beneficiaries where trustee also serves as executor); N.Y. Surr. Ct. Prac. Act § 1904 (1967) (requiring notice to remainderman concerning disposition of trust property). *See also* Ohio Rev. Code Ann. § 5303.22 (1989) (requiring notice to "persons interested" in sale of an estate's property).

[16] *E.g.*, Fla. Stat. Ann. § 733.613 (1976) (executor not required to provide notice of sale of trust property); Ind. Code Ann. § 29-1-15-15 (1989) (same); Ill. Ann. Stat. ch. 110½, ¶ 6-10 (1989) (executor not required to notify trust beneficiaries that probate has commenced). *Cf.* Utah Code Ann. § 57-1-25 (1989) (requiring notice by publication of proposed sale of trust property).

[17] *E.g.*, Ariz. Rev. Stat. Ann. § 14-3705 (1989); Kan. Stat. Ann. §§ 59-2209, 59-2222 (1983); Mass. Gen. Laws Ann. ch. 192, § 12 (1958); Nev. Rev. Stat. Ann. § 136.100 (1986); Or. Rev. Stat. Ann. § 113.145 (1984); S.C. Code Ann. § 62-3-403 (1987); S.D. Codified Laws Ann. § 30-6-8 (1984); Wash. Rev. Code Ann. § 11.28.237 (1987). *Cf.* Tex. Prob. Code Ann. § 128A (1990) (notice *inter alia* to "a charitable organization • • • named as a devisee").

[18] *E.g.*, Wyo. Stat. Ann. § 2-7-205 (1989).

[19] *E.g.*, Neb. Rev. Stat. § 30-2222 (1985); Va. Code Ann. § 64-1-82 (1986); W. Va. Code § 41-5-5 (1982); Wis. Stat. Ann. § 879.03 (1989).

[20] *E.g.*, N.J. Civ. Prac. Rule 4:80-8 (1989); Or. Rev. Stat. Ann. § 128.720 (1984); R.I. Gen. Laws § 18-9-13 (1988); Tex. Prob. Code Ann. § 123.001 (1987).

ernmental agency[21] be notified of transactions affecting CRTs, but such officials, in practice, rarely communicate notice to charities directly.

Amici believe that providing notice to charitable beneficiaries of judicial actions substantially affecting their rights—particularly the commencement of probate proceedings and sales of significant trust assets—would materially increase the value of property that charities ultimately receive from CRTs. In *amici's* experience, it is common for trustees of CRTs also to serve as executors of the corresponding estates, making potential conflicts of interest less the exception than the rule. Under the current patchwork of state-law notice provisions, such CRTs are often administered for years—even decades—without the charitable remainderman's even knowing of the trust's existence. Only after all income beneficiaries die, or the life tenants' interests otherwise terminate,[22] do trustees of CRTs typically inform charitable remaindermen of their entitlements. By then, the passage of time will often have made it impracticable for charities to challenge actions that may have affected them adversely.

4. The question presented here is also of importance to the United States. It is not uncommon for agencies of the Federal Government, such as the National Parks Service and the Forest Service, to receive remainder interests in CRTs funded with farmland or other realty. *Amicus* American National Red Cross, a congressionally-chartered charity that is also a federal instrumentality, receives charitable remainders and other deferred gifts in the range of $30 million annually. In such instances, the United States has

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[21] *E.g.*, Va. Code Ann. § 55-29 (1986) (trustee of CRT must make annual accounting to county or city commissioner); Vt. Stat. Ann. tit. 14, § 2501 (1974) (same, to probate court).

[22] The Internal Revenue Code allows qualified CRTs to have income interests for up to 20 years. IRC § 664(d)(1)(A).

a direct pecuniary interest in receiving notice of relevant probate proceedings.

The decision of the Wyoming Supreme Court also affects the United States in its regulatory capacity. Congress has expressed a sharply defined policy that charities receive the full value of property destined to them through trust arrangements. The Government has an interest in maintaining the integrity, not only of the charitable contribution deduction, but also of the regulatory scheme that Congress has adopted to hold fiduciaries accountable for misfeasance in connection with CRTs.

Prior to 1969, there were manifold opportunities for abuse in making split-interest gifts to charity, enabling donors unjustly to claim tax deductions vastly in excess of the amounts charities ultimately realized. The Treasury Department accordingly recommended enactment of "specific requirements which will ensure that the charity will actually receive that portion of the property for which a deduction is allowed." U.S. Treasury Dept., *Tax Reform Studies and Proposals (Part 2)*, 91st Cong., 1st Sess. 183 (1969). Congress responded by enacting Code sections 664 and 2055(e)(2), restricting charitable deductions for remainder interests to two statutorily-defined types of trusts: annuity trusts and unitrusts.

These provisions are designed to "ensure that there is a direct relationship between the deduction claimed and the charitable benefit involved." *Tax Reform Studies*, *supra*, at 183. They preclude charitable deductions where "it is not probable that the gift will be ultimately received by the charity," for example, where the charity "has only a contingent remainder interest." H.R. Rep. 91-413 (Pt. 1), 91st Cong., 1st Sess. 58-59 (1969); Treas. Reg. § 20.2055-2(b). They also prevent donors from "obtain[ing] a charitable contribution deduction for a gift of a remainder interest in trust to a charity * * * substantially in excess of the amount the charity may ultimately receive," *e.g.*, where

the trustee has discretionary power to invade corpus for the life tenant's benefit. S. Rep. 91-552, 91st Cong., 1st Sess. 87 (1969).

Besides mandating changes to the form of governing trust instruments, Congress in 1969 enacted new penalty taxes aimed at deterring misfeasance by (among others) fiduciaries of CRTs. Under Code section 4947(a)(2), the actuarial share of a charitable remainderman is subject to the same protections against self-dealing (IRC § 4941), jeopardizing investments (IRC § 4944), and taxable expenditures (IRC § 4945) that apply to private foundations. Transactions in an estate destined for charity are also subject to penalty taxes if the fiduciary fails to comply with the Code's regulatory requirements. *See* Treas. Reg. § 53.4941(d)-1(b)(3); *Rockefeller v. United States*, 572 F. Supp. 9 (E.D. Ark. 1982), *aff'd*, 718 F.2d 290 (8th Cir. 1983), *cert. denied*, 466 U.S. 962 (1984).

These statutes reflect Congress's strong policy that gifts destined to charity through CRTs not be frittered away through improper actions by trust fiduciaries. Wholly apart from cases of fiduciary malfeasance, moreover, Congress's objectives will be frustrated whenever the value of a CRT's assets is needlessly reduced below its value when the trust was created. The donor's tax deduction is keyed to the value of property transferred to the trust. *See* note 4, *supra*. If the value of a CRT's property subsequently declines—*e.g.*, because trust assets are sold at improvidently low prices—the amount ultimately received by charity will be reduced, and the legislative subsidy represented by the tax deduction concomitantly wasted.

The resources of the IRS are limited, and charitable remainder trusts are not at the top of the Commissioner's list of enforcement priorities.[23] Even if they were, the IRS

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[23] In response to a FOIA request, the IRS has advised that it has completed audits of only 22 returns filed by CRTs for fiscal 1987, 1988,

could not possibly detect all cases of possible abuse. Given these facts, the best prophylactic against devaluation of a charity's interest is oversight by the charity itself. If interested charities are directly and immediately involved in judicial proceedings affecting their rights—as the Due Process Clause requires—the enforcement burden of the IRS will be lightened and the objectives of Congress more fully realized.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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and 1989, and that it currently plans no audits of CRT returns for fiscal 1990.

APPENDIX

APPENDIX

More complete descriptions of *amici* other than Independent Sector are as follows:

1. The American National Red Cross is an instrumentality of the United States and a charitable organization. *See Department of Employment v. United States*, 385 U.S. 355 (1966). Its purposes include providing disaster relief assistance and preparedness, instruction in first aid and safety, and the conduct of blood services programs, including biomedical research.

2. The United Way of America is the national charitable organization of approximately 1,400 local member United Ways. Its members raise over $2.9 billion per year in funds, which are distributed to over 40,000 charitable agencies. The national organization assists the local United Ways, and the agencies they serve, in the areas of fundraising and administration.

3. The Salvation Army is an international religious and charitable movement that conducts a spiritual ministry devoted to preaching the Gospel, disseminating Christian beliefs, supplying basic human necessities, and undertaking the spiritual and moral regeneration and physical rehabilitation of all persons in need. Last year, the organization provided practical assistance to more than 25 million persons in the United States.

4. The National Audubon Society is dedicated to the conservation of wildlife and natural resources. It has almost 600,000 individual members organized into 550 chapters nationwide. Deferred gifts such as charitable remainder trusts account for about 25% of its total contributed income.

5. The General Conference of Seventh-day Adventists is the organization that directs and funds the church's worldwide operations. The Conference has approximately $100 million in known charitable remainder interests. Knowl-

edge and oversight of these trusts is vital to the Conference's operation of its 496 hospitals, dispensaries and nursing homes serving 6.4 million people annually; its 5,400 schools with 795,000 students; its relief and development activities helping 14 million persons per year; and its 26,000 congregations with 6 million members.

6. The Association of Catholic Colleges and Universities is an association of 207 accredited Catholic colleges and universities. The Association's purposes are to facilitate exchange among Catholic institutions of higher education, to represent the members to other national and international church and educational associations, and to assist its members in dealing with various agencies of the Federal Government.

7. The United Church of Christ is a church denomination with approximately 6,200 congregations and 11 million individual members. It operates 350 hospitals and nursing homes, 33 colleges and universities, and 7 seminaries.

8. The Christian College Coalition is an association of 78 Christian institutions of higher education. Its members are affiliated with thirty denominations and have more than 4,000 faculty and 90,000 students. The Association provides various services to members, including promotion of deferred giving programs employing charitable remainder trusts.

9. The Baptist Joint Committee on Public Affairs is composed of representatives from eight cooperating Baptist conventions and conferences, which have a total membership of approximately 30 million persons in the United States. The Baptist Joint Committee represents numerous Baptist agencies, seminaries, and colleges.

10. The Evangelical Council for Financial Accountability comprises more than 600 religious, charitable, and educational organizations. Its purpose is to assist member organizations in their fundraising activities, including advising

and assisting them in the use of charitable remainder trusts, and promoting appropriate supervision of such trusts by federal and state authorities.

11. The National Association of Homes for Children represents more than 400 charitable agencies serving children, including 13 state child-care associations. The Association provides members with a means of solving problems of mutual concern, provides education and training opportunities for members, works to improve the care of children, and represents the interests of the members before Congress and federal agencies.